IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FURMAN LUMBER, INC.	:	CIVIL ACTION
v.	:	
THE MOUNTBATTEN SURETY CO., INC.	:	NO. 96-7906

R.F. & B. LUMBER CO., INC.	:	CIVIL ACTION
v.	:	
THE MOUNTBATTEN SURETY CO., INC.	:	NO. 96-8168

TALL TREE LUMBER CO.	:	CIVIL ACTION
v.	:	
THE MOUNTBATTEN SURETY CO., INC.	:	NO. 96-8352

M E M O R A N D U M

Padova, J. July 9, 1997

Plaintiffs, Furman Lumber, Inc. ("Furman"), R.F. & B. Lumber Co., Inc. ("RFB"), and Tall Tree Lumber Company ("Tall Tree") (hereinafter "Plaintiffs") filed separate lawsuits against Defendant, the Mountbatten Surety Co. ("Mountbatten"). The Court consolidated these cases for pre-trial purposes. (See Doc. No. 6). Before the Court is Plaintiffs' Joint Motion for Leave to File an Amended Complaint, filed pursuant to Federal Rule of Civil Procedure 15(a). Plaintiffs request leave to add a "bad faith" claim under 42 Pa. Cons. Stat. Ann. § 8371 (West Supp. 1997).

Because the Court (1) considers Plaintiffs' delay in seeking

the amendment undue and (2) finds that the addition of the proposed amendment would be prejudicial to Mountbatten, the Court will deny Plaintiffs' Motion.

I. Facts

Plaintiffs are wholesalers who sold lumber supplies to Ridge Lumber Company ("Ridge"). On February 21, 1996, Mountbatten issued three nearly identical payment bonds ("Bonds") naming each Plaintiff as obligee and Mountbatten as surety for Ridge.[1] Under the Bonds, Mountbatten "is firmly bound unto [Plaintiffs] as obligee." (Compls. ¶¶ 5). The Bonds guaranteed Plaintiffs payment for lumber supplies shipped to Ridge in the event that Ridge failed to reimburse Plaintiffs for the shipments. "Mountbatten issued the Bond[s] in consideration that [Plaintiffs] would sell materials and services on credit to Ridge." (Compls. ¶¶ 6).

Plaintiffs allege Ridge has failed to pay amounts due for the materials. (Compls. ¶¶ 8). According to Plaintiffs, despite timely notification of Ridge's default and Plaintiffs' demand, Mountbatten refuses to honor its obligations to pay under the Bonds. (Compls. ¶¶ 9).[2]

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[1] See Blacks Law Dictionary 1442 (6th ed. 1990) (defining contract of suretyship as a contract whereby "one party engages to be answerable for debt, default, or miscarriage of another and arises when one is liable to pay debt or discharge obligation, and party is entitled to indemnity from person who should have made the payment in the first instance before surety was so compelled").

[2] According to Plaintiffs, Ridge is currently in bankruptcy. (Pls.' Mem. Supp. Mot. at 1-2) ("Pls.' Mem.").

Plaintiffs filed their Complaints on November 27, 1996 (Furman), December 10, 1996 (RFB), and December 17, 1996 (Tall Tree). Each Complaint contains only one count, a breach of contract claim. On February 18, 1997, pursuant to Federal Rule of Civil Procedure 16, the Court entered a Scheduling Order imposing the following deadlines: (1) dispositive motions, June 13, 1997; (2) discovery, May 30, 1997; (3) Plaintiffs' Pretrial Memorandum, July 15, 1997; (4) Defendant's Pretrial Memorandum, July 25, 1997; (5) Final Pretrial Conference, July 28, 1997; and (6) Trial Pool, August 1, 1997. (See Doc. No. 5). Plaintiffs filed their Motion for Leave to Amend on June 2, 1997.

II. Standard of Review

"[A] party may amend a pleading at any time prior to the service of a responsive pleading. If a responsive pleading has been filed, then a party may amend a pleading only upon leave of the court or written consent of the adverse party." Glaziers & Glass Workers v. Janney Montgomery Scott, 155 F.R.D. 97, 99 (E.D. Pa. 1994) (citation omitted). "[L]eave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Although leave to amend a complaint should be freely granted in the interests of justice, a motion to amend is committed to the sound discretion of the district judge." Gay v. Petsock, 917 F.2d 768, 772 (3d Cir. 1990) (citations omitted). The Court should freely exercise this discretion in "the absence of any apparent or declared reason -- such as [1] undue delay, [2] bad faith or dilatory motive on the

part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [5] futility of the amendment, etc." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

"The [United States Court of Appeals for the] Third Circuit has interpreted [the Foman] factors to emphasize that prejudice to the non-moving party is the touchstone for the denial of the amendment." Hill v. Equitable Bank, N.A., 109 F.R.D. 109, 112 (D. Del. 1985) (citing Cornell & Co. v. Occupational Safety and Health Rev. Comm'n, 573 F.2d 820, 823 (3d Cir. 1978)). "[I]f the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial." Rehabilitation Inst. v. Equitable Life Assurance Society of the United States, 131 F.R.D. 99, 102 (W.D. Pa. 1992) (citing 6 Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 1487 (1990)), aff'd, 937 F.2d 598 (3d Cir. 1991). See Niesse v. Shalala, 17 F.3d 264, 266 (8th Cir. 1994) (refusing to find the district court abused its discretion in denying a request to amend where it "was correct in noting that considerable additional discovery would be required to deal with the question of class certification"); Berger v. Edgewater Steel Co., 911 F.2d 911, 924 (3d Cir. 1990) (affirming district court's denial of motion for leave to amend where "allowing the amendment here would inject new issues into the case

requiring extensive discovery"), cert. denied, 499 U.S. 920, 111 S. Ct. 1310 (1991); Cuffy v. Getty Ref. & Mktg. Co., 648 F. Supp. 802, 806 (D. Del. 1986) (noting "the general presumption in favor of allowing amendment can be overcome only by the opposing party showing that the amendment will be prejudicial").

III. Discussion

A. Proposed Amendment

The Amended Complaint proposed by Plaintiffs states the following allegations. Mountbatten issued at least eight Bonds to Ridge worth over $2,600,000, listing Ridge as principal and other Ridge suppliers as obligees. (Pls.' Mem. Ex. A. ¶ 13) ("Pr. Am. Compl."). "Mountbatten knew, before it issued the Bond[s], that Ridge was late in payments to several of its suppliers . . . yet, Mountbatten never made reasonable inquiry." (Pr. Am. Compl. ¶ 16). Mountbatten's agents knew, by at least May, 1996, that Ridge was having difficulty paying its suppliers. (Pr. Am. Compl. ¶ 18). "As a result of Ridge's difficulty in paying suppliers, Mountbatten notified all obligees by letter dated July 11, 1996, that they were, from that date forward, to sell to Ridge on a cash on delivery basis only." (Pr. Am. Compl. ¶ 19).

"As surety on the Payment Bond[s], Mountbatten had the duty, pursuant to . . . . § 8371, to act in good faith toward and deal fairly with Furman in considering any claim by Furman under the Payment Bond[s]." (Pr. Am. Compl. ¶ 20). Nonetheless, Mountbatten

will not pay obligees under the bond.[3] Mountbatten's refusal to pay the Payment Bond constitutes bad faith under § 8371 because:

> (a) When [Plaintiffs] made the claim under the Payment Bond, Mountbatten's agents knew that it could not assert the defense that the Payment Bond was void from the beginning; yet, in reckless disregard of this knowledge, it has based its refusal to pay the claim on this defense; and
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> (b) Mountbatten's agents knew, months before [Plaintiffs] made [their] claim, that Ridge was having difficulty paying its suppliers . . . and therefore had constructive notice of any 'default' under the Payment Bond; yet, in reckless disregard of this knowledge, Mountbatten has based its refusal to pay the claim on the defense of untimely notification.

(Pr. Am. Compl. ¶ 22).[4]

B. Undue Delay & Prejudice

The Court focuses on whether Plaintiffs' delay in seeking

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[3] Mountbatten claims, as two of its affirmative defenses, that (1) "Ridge was in 'default' to [Plaintiffs] before and at the time Mountbatten issued the Payment Bond[s]," and (2) Furman's failure to inform Mountbatten of Ridge's default in a timely fashion renders the Bonds void. (Pr. Am. Compl. ¶ 21).

[4] Section § 8371 provides:

> **Actions on Insurance Policies**
> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%;
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371.

amendment is undue and whether granting Plaintiffs' leave to amend will be prejudicial to Mountbatten. According to Plaintiffs, in an effort to investigate the defense that Mountbatten was unaware of Ridge's default when it issued the Bonds, Plaintiffs noticed the depositions of (1) Mountbatten's underwriters responsible for authorizing the issuance of the Ridge bonds (Chris Mucchetti and Steven Fletcher) and (2) Mountbatten's agent who produced the bonds (Russell Tyldesley).

Plaintiffs deposed Mucchetti on April 3, 1997, Fletcher on April 24, 1997, and Tyldesley on May 21, 1997. (Pls.' Mem. at 6, 8). According to Plaintiffs, Mucchetti:

> admitted that he received from Mr. Tyldesley a Ridge account's payable aging report and letter from its controller, both dated January 29, 1996, before the bonds issued on February 21. The aging report and letter demonstrated that Ridge was late in payments to its suppliers 30-60 days in the amount of $1.6 million. The aging report specified that Ridge owed Plaintiffs several thousand dollars in the 30-60 day category.
>
> Mr. Mucchetti also admitted that he never knew what the credit terms were between Ridge and the prospective obligees. He never knew, he said, because he never asked.

(Pls.' Mem. at 6-7). Fletcher's testimony, claim Plaintiffs, contradicted Mucchetti's testimony. (Pls.' Mem. at 7 ("Fletcher testified that he did not believe Mountbatten had the accounts payable aging before the bonds issued. If it had known the information, he admitted, Mountbatten never would have issued the bonds")).

According to Plaintiffs, Tyldesley's testimony resolved discrepancies between Mucchetti's and Fletcher's depositions and

confirmed Plaintiffs' suspicions that Mountbatten has no reasonable basis to support its "void ab initio" defense. (Pls.' Mem. at 8 (stating Tyldesley testified that "weeks before Mountbatten issued the bonds, he sent Mountbatten financial information from Ridge which demonstrated that as of January 29, 1996, Ridge was late in its payments to Plaintiffs (and other obligees) by 30-60 days")). With respect to Mountbatten's second defense, that Plaintiffs failed to notify Mountbatten of Ridge's default in a timely manner, Plaintiffs claim they "recently learned, at the May 28 deposition of Ted Drauschak . . . that Mountbatten knew, in March 1996, that Ridge was having difficulty paying its suppliers. As with Mr. Tyldesley's deposition, Mountbatten delayed Mr. Drauschak's deposition for over one month." (Pls.' Mem. at 9). Plaintiffs assert they waited until these facts became available, specifically after the Tyldesley and Drauschak depositions, on May 21 and May 28 respectively, to file the instant Motion.

Plaintiffs also posit that allowing leave to amend will not prejudice Mountbatten because the bad faith claim requires no additional discovery. Since the bad faith claim rests on Mountbatten's inability to supply a reasonable defense to Plaintiffs' claims under the Bonds, Plaintiffs argue that they have already produced all relevant documents regarding the claims, i.e., those relating to their dealings with Ridge and to their correspondence with Mountbatten.

Mountbatten protests that it has had no opportunity to take discovery related to this issue. According to Mountbatten, the

focus of discovery heretofore has been on alleged breach of contract and Mountbatten's affirmative defenses. Permitting the amendment, asserts Mountbatten, would shift the focus of discovery.

The Court concludes that Plaintiffs failed to file the instant Motion in a timely fashion. The addition of a § 8371 claim at this stage in the proceedings would prejudice Mountbatten.

> It would be unreasonable to restrict a party's ability to amend to a particular stage of the action inasmuch as the need to amend may not appear until after discovery has been completed or testimony has been taken at trial. Nonetheless, in keeping with the purpose of Rule 15(a), which is to facilitate a determination of the action on its merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time. In most cases, delay alone is not a sufficient reason for denying leave. However, an amendment clearly will not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the delay, the proposed amendment, if permitted, would have the effect of prejudicing another party to the action. If no prejudice is found, the amendment will be allowed.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1488 (1990).

The United States Court of Appeals for the Third Circuit ("Third Circuit") has noted that "[d]elay alone . . . is an insufficient ground to deny an amendment, unless the delay unduly prejudices the non-moving party." Cornell & Co., Inc. v. Occupational Safety and Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978) (citations omitted). See also Allied Erecting and Dismantling Co., Inc. v. United States Steel Corp., 786 F. Supp. 1223, 1226-27 (W.D. Pa. 1992) (noting "federal district courts

sitting in Pennsylvania have held that delay -- when accompanied by a deleterious ripple effect on a particular case or on the trial court's calendar -- warrants the denial of an otherwise appropriate amendment") (citation omitted).[5]

In the instant case, the Court believes Plaintiffs unduly delayed the filing of their Motion. The facts underlying the bad faith amendment, specifically that Mountbatten knew of Ridge's financial condition, were available after Mucchetti's deposition, i.e., as early as April 3, 1997. Outside of inconsistent testimony from Fletcher, Plaintiffs discovered nothing new in the litigation after that date. Plaintiffs nonetheless waited two months after Mucchetti's deposition, until June 2, 1997, to file the instant Motion. Plaintiffs should have filed their Motion closer to April 3, 1997. See e.g., Phoenix Tech., Inc. v. TRW, Inc., 834 F. Supp. 148, 150 (E.D. Pa. 1993) (finding no undue delay where "[a]fter learning this information, defendant filed the present motion . .

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[5] Wright & Miller cite a panoply of cases supporting the proposition that unjustified delay alone, without any concomitant prejudice, will not supply a sufficient reason to deny leave to amend. See e.g., Cornwall v. United States Const. Mfg., Inc., 800 F.2d 250, 253 (Fed. Cir. 1986) (reversing district court's denial of leave to amend answer and affirmative defense where, "despite the delay in attempting to amend . . . the district court did not discuss the factors which the Eleventh Circuit considers important, it did not offer any justifying reason for its decision, and because it appears that [defendant] was prejudiced by the denial"); Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir. 1986) (noting "[d]elay alone however, without any specifically resulting prejudice, or an obvious design by dilatoriness to harass the opponent, should not suffice as reason for denial") (citing Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980), cert. dismissed, 448 U.S. 911, 101 S. Ct. 25 (1980)).

. less than two weeks after [the deposition] was taken. In light of the fact that defendant's counsel filed its motion as promptly as possible after discovering this new information, we find there has been no undue delay in seeking leave to amend").

Plaintiffs' claim that it had to wait for Tyldesley's deposition to confirm Mucchetti's deposition before filing the instant Motion is unpersuasive. The dispositive question is not at which point Plaintiffs resolved testimonial inconsistencies, but when they first learned of the necessity for altering their pleadings, i.e., April 3, 1997. With respect to Plaintiffs' claims that Mountbatten initially delayed depositions, the Court notes that Plaintiffs could have filed motions to compel.

The Court also finds that granting Plaintiffs leave to amend would prejudice Mountbatten. Discovery has been closed for over one month, the dispositive motions deadline has passed, and this case is scheduled for trial in less than thirty days. The addition of a bad faith claim substantially alters the course on which the instant case has been proceeding. A breach of contract action typically involves an examination of objective factors such as contractual terms, duties, performance, and damages. By stark contrast, a § 8371 claim involves an evaluation of subjective intent. Compare Kerrigan v. Villei, No. 95-4334, 1996 WL 84271, at *3 (E.D. Pa. Feb. 28, 1996) (requiring, for breach of contract claim, allegations of "the existence of a contract, which created the duties of the defendant, the failure of the defendant to comply with his duties, the damages suffered by plaintiff as a result of

the breach, and the full satisfaction by plaintiff of his own obligations under the contract") (citing Public Serv. Entertainment Group v. Philadelphia Elec. Co., 722 F. Supp. 184, 219 (D.N.J. 1989)), with, Klinger v. State Farm Mut. Automobile Ins. Co., ___ F.3d ___, Nos. 96-7102, 96-7101, 96-7074, 1997 WL 307778, at *2 (3d Cir. June 10, 1997) (listing elements of § 8371 claim as "(1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis").

Finally, Plaintiffs proposed amendment would require Mountbatten to engage in significant new trial preparation, including, inter alia, a factual investigation of a new and substantially broader claim. See Berger, 911 F.2d at 924 (affirming denial of motion for leave to amend where "allowing the amendment would inject new issues into the case requiring extensive discovery. The motion not only came four and one-half months after the information on which it was based became available, but also after the close of an extended discovery period"); Elf Atochem N. Am., Inc. v. United States, 161 F.R.D. 300, 302 (E.D. Pa. 1995) (refusing leave to add affirmative defense where discovery was "virtually complete" and where additional defense was "materially different from the other defenses in place"); Johnston v. City of Philadelphia, 158 F.R.D. 352, 353 (E.D. Pa. 1994) (denying motion for leave to amend where "discovery has closed, summary judgment motions have been ruled on, and the case is literally on the eve of trial") (citing cases); Saini v. Bloomsburg Univ. Faculty, 826 F.

Supp. 882, 889 (M.D. Pa. 1993) (denying leave to amend where "[p]ermitting plaintiff to amend his complaint to add an entirely new claim at this late date would require us, in fairness to the defendants, to reopen discovery, re-open the period for filing dispositive motions, and delay the scheduled trial date"); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1488 (1990) (stating "[d]elay in moving to amend also increases the risk that the opposing party will not have an adequate opportunity to prepare his case on the new issues raised by the amended pleading").

Accordingly, in the presence of prejudice and undue delay, the Court will deny Plaintiffs' Motion.

An appropriate Order follows.

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O R D E R

AND NOW, this 9th day of July, 1997, upon consideration of Plaintiffs' Joint Motion for Leave to File an Amended Complaint (Doc. No. 8), Plaintiffs' Supplemental Memorandum in support thereof (Doc. No. 9), Defendant's Memorandum in Opposition thereto (Doc. No. 10), and Plaintiffs' Reply (Doc. No. 12), **IT IS HEREBY ORDERED THAT**:

1. Plaintiffs' Motion is **DENIED**.

BY THE COURT:

John R. Padova, J.